**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **CAROL W. PINKERTON** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 1,034,806 |
| **HEN HOUSE MARKET/FOUR B CORPORATION** | ) | |
| Self-Insured Respondent | ) | |

## ORDER

Respondent appeals the January 24, 2008 preliminary hearing Order of Administrative Law Judge Kenneth J. Hursh. Claimant was awarded benefits in the form of medical treatment to repair her teeth after the Administrative Law Judge (ALJ) determined that,

> [t]he exact reason for the claimant's fall cannot be determined with any certainty, but the injuries sustained from the fall had to have occurred from striking the tile floor or some other object at the workplace.[1]

This was found by the ALJ to be sufficient to determine "a causal connection between the work conditions and the resulting injury".[2]

Claimant appeared by her attorney, Michael J. Haight of Kansas City, Missouri. Respondent and its insurance carrier appeared by their attorney, Jennifer Arnett of Overland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held January 23, 2008, with attachments; and the documents filed of record in this matter.

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[1] Order (January 24, 2008) at 2.

[2] *Id*. at 2.

## ISSUE

Did claimant's accident and the resulting injuries arise out of and in the course of her employment with respondent? Claimant suffered a fall on December 23, 2006, while at work. Respondent contends the fall was the result of a personal health problem of claimant and not from her work for respondent. Claimant contends the fall was unexplained or due to a hazard of employment and, therefore, compensable under Kansas law.

## FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed.

Claimant suffered a fall while at work at respondent's grocery store on December 23, 2006. The fall occurred as claimant left the restroom. She has no recollection of the fall and there were no witnesses to the incident. As a result of the fall, claimant suffered injuries, including several broken teeth. There is no information in this record as to the condition of the floor in the area where claimant fell other than that it was tile. No witness was able to testify whether the floor was slick or wet at the time of the fall.

Claimant denies the fall was the result of any physical ailment or preexisting condition. There is information in this record to indicate claimant suffered from migraine headaches which could cause her to fall, faint or suffer seizures. The Johnson County Med-Act report of December 23, 2006, indicates co-workers of claimant reported that claimant had a seizure before the EMTs arrived. Additionally, claimant experienced two more seizures as the EMTs were preparing her for transport to the hospital.[3] Claimant also reported to the EMTs that she has had previous seizures when experiencing migraine headaches, and claimant had been suffering a migraine headache since the afternoon before the accident and was still experiencing the migraine the morning of the accident. Claimant had also experienced a seizure the night before the accident.[4] Medical records from 2001 show claimant as having a history of severe headaches, at times described as migraines, coupled with unexplained falls, and episodes of passing out.

Claimant was examined by neurologist Michael E. Ryan, M.D., on July 17, 2007. In the history provided Dr. Ryan, claimant denied preexisting seizures, which the doctor questioned after reviewing claimant's past medical records. After examining and

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[3] P.H. Trans., Resp. Ex. A.

[4] P.H. Trans., Resp. Ex. A.

interviewing claimant and reviewing the past medical records, Dr. Ryan determined that claimant's fall was the result of a seizure. He, in part, based this determination on the fact that claimant did not attempt to break her fall in any way.

Claimant was examined by neurologist James S. Appelbaum, M.D., on December 30, 2006, with follow-up examinations on April 5, 2007, and June 7, 2007. The history contained in Dr. Appelbaum's reports indicates claimant had a history of only one seizure, rather than the multiple seizures documented in the EMT reports and the records of Dr. Ryan. According to his report of June 7, 2007, Dr. Appelbaum determined that claimant's seizure was due to the fall, and not vice versa. How he reached this determination is not explained in the report.

## PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[5]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[6]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[7]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental

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[5] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[6] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[7] K.S.A. 2006 Supp. 44-501(a).

> injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[8]

It is not disputed that claimant's accident occurred in the course of her employment. However, the question of whether the accident arose out of the employment is a far more complicated question.

To arise "out of" employment requires some causal connection between the accidental injury and the employment.[9] Whether an injury arises out of the worker's employment depends on the facts peculiar to the particular case.[10]

It has been held in Kansas where the effects of a fall are the result of a personal condition, but the conditions of employment place the employee in a position increasing the effects of an injury, the injury becomes compensable.[11] However, where an employment injury is clearly attributable to a personal condition of the employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted.[12]

The Kansas Supreme Court has held that there are three general categories of risks in workers compensation cases: (1) those distinctly associated with the job; (2) risks which are personal to the worker; and (3) the so-called neutral risks which have no particular employment or personal character.[13] In *Martin*,[14] the Court of Appeals stated:

> Only those risks falling in the first category are universally compensable; personal risks do not arise out of the employment and are not compensable.

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[8] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[9] *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

[10] *Id.* at 502.

[11] *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 824 P.2d 1001, *rev denied* 250 Kan. 804 (1992), citing 1 *Larson's Workers' Compensation Law*, § 12.11 (1990).

[12] *Id.* at 460, citing *Southland Corp. v. Parson*, 1 Va. App. 281, 338 S. E. 2d 162 (1985).

[13] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

[14] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

This Board Member finds the fall suffered by claimant was the result of a personal condition and not the result of anything associated with the claimant's job with respondent. This record supports a finding that claimant suffered a seizure which led to the fall and resulting injuries.

However, where an injury results from the concurrence of some preexisting idiopathic condition and some hazard of employment, compensation is generally allowed.[15] There is general agreement that the effects of a fall are compensable if conditions of employment place the employee in a position increasing the effects of a fall, such as in a moving vehicle.[16] In *Bennett*, the claimant had a seizure while driving a vehicle in the course of his employment. The seizure was caused by a preexisting condition of which the employer was aware. The Court found the risk of travel coupled with the personal condition combined to produce the injuries and caused those injuries to be compensable.

In this matter, the ALJ seems to determine that the fall onto the tile floor constituted a risk or hazard which, when coupled with the seizure, made claimant's resulting injuries compensable. The Board has previously ruled on this issue in a similar fact situation. In *Roberts*,[17] the Board held that a fall on a hard concrete floor and a hard plastic floor mat would not constitute a hazard that would increase claimant's risk of injury. That ruling is reaffirmed here. The mere fact claimant landed on a hard tile floor does not make an otherwise non-compensable fall compensable. Therefore, the Order of the ALJ, finding this injury to be compensable, is reversed. Claimant has failed to show that her injuries arose out of her employment with respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[18] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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[15] *Bennett*, *supra*.

[16] *Id*., citing 1 *Larson's Workers' Compensation Law*, § 12.11 (1990).

[17] *Roberts v. Salina Retailers Association*, No. 1,016,052, 2004 WL 3089877 (Kan. WCAB Nov. 19, 2004).

[18] K.S.A. 44-534a.

## CONCLUSIONS

Claimant has failed to prove that her injuries suffered in the course of her employment with respondent arose out of that employment. Therefore, the award of benefits by the ALJ, is reversed.

## DECISION

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated January 24, 2008, should be, and is hereby, reversed.

**IT IS SO ORDERED.**

Dated this ____ day of March, 2008.

HONORABLE GARY M. KORTE

c: Michael J. Haight, Attorney for Claimant
Jennifer Arnett, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge